

D.T.E. 02-56

Investigation by the Department of Telecommunications and Energy into the Petition of The
Berkshire Gas Company for approval of a Gas Sales Agreement with EnCana Corporation

APPEARANCES: James M. Avery, Esquire
Brown Rudnick Berlack Israels LLP
One Financial Center
Boston, Massachusetts 02111
FOR: The Berkshire Gas Company
Petitioner

Matthew Morais, Esquire
Division of Energy Resources
70 Franklin Street, 7th Floor
Boston, Massachusetts 02110-1313
FOR: Division of Energy Resources
Intervenor

I. INTRODUCTION

On September 18, 2002, The Berkshire Gas Company (“Berkshire” or “Company”), pursuant to G.L.c. 164, §§ 93 and 94A, submitted for approval by the Department of Telecommunications and Energy (“Department”) a Gas Sales Agreement (“Sales Agreement”) that the Company executed with EnCana Corporation (“EnCana”),¹ an Agency Agreement (“Agency Agreement”), and a Management Services Agreement (“Management Services Agreement”) that the Company executed with Northeast Gas Markets LLC (“NEGM”).² The Sales Agreement, dated August 7, 2002, replaces a supply contract between Berkshire and Boundary Gas, Incorporated (“Boundary”)³ dated March 7, 1991, which expires January 15, 2003. The Agency and Management Services Agreements, dated August 8, 2002, require NEGM to perform the necessary solicitation of bids to replace the expiring Boundary contract as well as perform services functions in connection with the dispatch and other operational functions associated with the Sales Agreement.

¹ EnCana Corporation is a Canadian Corporation, with principal offices in Calgary, Alberta. EnCana Corporation was formed from the merger of PanCanadian Energy and AEC Oil & Gas Company (Exh. BG-1, at 12; Exh. BG-2, at 1).

² NEGM is a project development and gas supply contract management firm located in Beverly, Massachusetts. NEGM was originally formed in 1979 to support the interest of a consortium of local distribution companies in obtaining incremental gas supply and associated transportation capacity. In the past 23 years, NEGM and its predecessor entity have served the gas supply needs of a group of twenty northeast local distribution companies in New England, New York, and New Jersey, including The Berkshire Gas Company (Exh. RR-DTE-2).

³ Boundary is a Federal Energy Regulatory Commission-regulated consortium of fourteen northeast United States local distribution companies formed in 1980 to facilitate the procurement of incremental supplies of Canadian natural gas to meet market growth in the U.S. northeast. The Boundary initiative was the first direct purchase venture by local distribution companies in the United States.

On October 24, 2002, pursuant to notice duly issued, the Department conducted a public hearing to afford interested persons the opportunity to comment on Berkshire's proposal. The Department granted the Petition to Intervene of the Division of Energy Resources ("DOER"). On November 6, 2002, the Department held an evidentiary hearing. Berkshire presented the testimony of Karen L. Zink, vice president of Berkshire. The evidentiary record consists of forty (40) exhibits, consisting primarily of Berkshire's responses to information and record requests. On November 8, 2002, DOER filed its Initial Brief. On November 13, 2002, Berkshire submitted its Initial Brief.

II. DESCRIPTION OF PROPOSED AGREEMENTS

A. Sales Agreement

The Sales Agreement executed with EnCana is the result of a competitive solicitation pursued by Berkshire and several other local distribution companies ("LDCs") in the northeast on a coordinated basis (collectively, "the Boundary Renewal Working Group" or "Working Group")⁴ to replace a supply contract with Boundary dated March 7, 1991, which expires on January 15, 2003 (Exh. BG-1, at 4-7). The Sales Agreement entitles Berkshire to receive, on a firm basis, 1,083 dekatherms ("Dth") per day from EnCana to be delivered at the international boundary near Niagara Falls where the facilities of Tennessee Gas Pipeline Company ("TGP") and TransCanada Pipelines Limited interconnect (id. at 15; Exh. BG-2, at 4). The Agreement

⁴ The other local LDCs include Bay State Gas Company; Boston Gas Company d/b/a KeySpan Energy Delivery New England; The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York; Energy North Natural Gas, Inc. d/b/a KeySpan Energy Delivery New England; Essex Gas Company d/b/a KeySpan Energy Delivery New England; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island; and Northern Utilities, Inc. (Exh. BG-4, at 1; Exh. BG-5, at 1).

is for a period a little longer than fourteen months, from January 15, 2003 through April 1, 2004 (Exh. BG-1, at 15).

The Agreement includes pricing provisions of gas deliveries which shall be at the “Monthly Contract Index” as set forth in the Gas Daily Price Guide for deliveries at Niagara in the applicable month, plus a charge per Dth as specified in the Agreement (id.). Berkshire states that because the Company’s current supply contract with Boundary terminates in the middle of the month (i.e., January 15, 2003) it was necessary for the Company to secure a separate pricing provision for the period from January 15, 2003 to February 1, 2003 (id.). Berkshire states that the Sales Agreement is consistent with the public interest “because it contributes to a least-cost resource portfolio consistent with the Company’s portfolio objectives,” which include the provision of reliable, least-cost service with a minimum impact on the environment under normal and design conditions (Exh. BG-1, at 16).

The Company explained that the Sales Agreement with EnCana provides several benefits to its customers (id.). First, the inclusion of a Canadian resource in its resource portfolio helps the Company to diversify its pipeline base-load supply, enabling the Company to continue to provide reliable, least-cost service to customers (id.). Second, the competitive solicitation pursued by the Working Group helps Berkshire secure a least-cost replacement supply with attractive pricing provisions and flexible contract terms compared to what it would have obtained on a stand-alone basis (Exh. BG-1 at 14, 17; Exh. DTE 1-2). Finally, by performing the solicitation and contract negotiation processes on a coordinated basis, Berkshire incurred a transactions cost of only \$4,026, which is 1.58 percent of the Working Group total transactions costs of \$254,389 (Exh. DTE 1-3; RR- DTE-1).

B. Agency Agreement

Berkshire entered into an Agency Agreement with NEGM on August 8, 2002 (Exh. BG-1, at 15; Exh. BG-4, at 1). Under the Agency Agreement, NEGM will act on Berkshire's behalf as the administrative agent for all purposes under and with respect to the Company's Sales Agreement with EnCana (Exh. BG-1, at 15; Exh. BG-4, at 1). The functions that NEGM shall perform under the Agency Agreement include the following: (1) submit nominations to EnCana; (2) receive invoices and make payments on behalf of Berkshire; (3) declare, or receive notice of, force majeure on behalf of Berkshire; and (4) execute all other necessary actions related to the Sales Agreement, including the preparation and filing of U.S. Customs forms and payments and other operational reports as may be required by relevant regulatory agencies (Exh. BG-1, at 15; Exh. DTE 1-1; RR-DTE-2).

The Agency Agreement becomes effective as of the date on which the Company's Sales Agreement becomes effective (i.e., January 15, 2003) and shall continue in full force and effect until the termination of the Sales Agreement (Exh. BG-4, at 6). However, Berkshire "has the right to terminate the Agreement under specified conditions" (id.). The Agency Agreement can also be renewed (id. at 6-7).

C. Management Services Agreement

Berkshire entered into a Management Services Agreement with the NEGM on August 8, 2002 (Exh. BG-5, at 1). Under the Management Services Agreement, NEGM will act on Berkshire's behalf as the administrative agent for all purposes under, and with respect to, the Company's Sales Agreement with EnCana (Exh. BG-1, at 15-16). The functions that NEGM shall perform under the Management Services Agreement include, among others, the following:

(1) receive notices from Berkshire of the Company's Scheduled Contract Quantities ("SCQ") pursuant to the Sales Agreement; (2) transmit to Berkshire all notices received from EnCana under the Sales Agreement; (3) maintain records of quantities and total heating value of gas sold by EnCana and transportation volumes allocated at the Niagara check meter by TGP; (4) analyze and reconcile the nominated and received gas volumes; (5) coordinate re-offerings of gas not nominated by Berkshire to other companies in the consortium; (6) notify Berkshire of the effective monthly Contract Price and, when applicable, the effective Reference Price under the Sales Agreement; (7) coordinate meetings of the consortium, EnCana and TGP, and any other appropriate parties, as may be necessary to discuss and resolve operational, commercial, and regulatory issues; and (8) remit sums due and owing by Berkshire to EnCana and third parties under the Sales, Agency, and Management Services Agreements (Exh. BG-1, at 15-16; Exh. BG-5, at 2-3; Exh. DTE 1-1; RR-DTE-2).

The Management Services Agreement becomes effective as of the date on which the Company's Sales Agreement becomes effective (i.e., January 15, 2003) and shall continue in full force and effect until the termination of the Sales Agreement (Exh. BG-5, at 7-8). However, Berkshire "has the right to terminate the Agreement under specified conditions (id.). The Management Services Agreement will can also be reviewed (Exh. BG-5, at 8).

Berkshire will pay a monthly fee to NEGM as compensation for the services under this Agreement (Exh. BG-1, at 16). The fee will be equal to the product of: (1) a \$0.0128 per Dth administration rate; (2) the maximum daily quantity ("MDQ") under the Sales Agreement; and (3) the number of days in such month, irrespective of the actual quantities of gas delivered to the Company for that month (id.; Exh. DTE 1-4).

D. The Request For Proposals Process

The Boundary Renewal Working Group issued a joint Request For Proposals (“RFP”) for a replacement gas supply to thirteen potential bidders on November 21, 2001 (Exh. BG-1, at 7; Exh. BG-7, at 1). The objective of the RFP was “to secure a reliable, competitive replacement gas supply for interested Boundary customers.” (Exh. BG-1, at 7). The estimated total replacement volumes was between 60,000 to 72,000 Dth per day (id.). The Working Group encouraged bids with a range of volume options that would provide delivery flexibility; bids with multiple terms and pricing options; bids based on a 100 percent take, or base load; and bids that included first of the month flexibility (id. at 8, 9). The Working Group gave bidders the opportunity to ask questions or seek clarification of the RFP’s objectives (id. at 8). The deadline for the submission of bids was December 20, 2001 (id. at 7). At the close of the solicitation process, nine suppliers submitted bids and four suppliers elected not to participate in the RFP process (id. at 9). The Working Group found that one of the bids submitted was incomplete and non-responsive; hence it was eliminated from further consideration (id.).

Berkshire states that the Working Group selected PanCanadian Energy Services⁵ (i.e., EnCana) as the winning bid based on a comprehensive evaluation and weighting of the following price and non-price factors and further negotiation: (1) price of the service offered (30%); (2) security of supply (35%); (3) bid flexibility (20%); and (4) rating of supplier (15%) (Exh. BG-1, at 9-12). The Company states that it was not aware of any bidder complaints or concerns with respect to the Working Group’s solicitation and evaluation process (id. at 12).

⁵ PanCanadian Energy Services is a subsidiary of PanCanadian Energy which merged with AEC Oil & Gas Company to form EnCana (Exh. BG-1, at 12; Exh. BG-2, at 1).

III. POSITIONS OF THE PARTIES

A. DOER

DOER recommends that the Department approve the Sales Agreement that Berkshire entered into with EnCana in this proceeding (DOER Brief at 1). DOER, however, suggests that Berkshire be required to include in its distribution gas tariffs Terms and Conditions, a condition that the Company hold annual face-to-face meetings with marketers to discuss its resource portfolio, resource plans, and any future supply and capacity resource decisions (id. at 1-3). DOER notes that although Berkshire sent out the mandatory letter to marketers advising them of upcoming decisions, the Company received little or no input from marketers regarding the replacement contract and the disposition of the TGP capacity. DOER alleges that the lack of response is because the letters sent to marketers did not reach the appropriate people at the marketing companies (id. at 2, citing Exh. DOER 1-7). DOER believes that face-to-face meetings between the Company and marketers will improve the flow of information between the parties (id.).

DOER did not submit any objection to the Agency Agreement, the Management Services Agreement, or the Joint RFP process.

B. Berkshire

With regard to the Agency and Management Services Agreements, Berkshire states that it did not conduct a separate solicitation with respect to the NEGM services because the Company believed that it was highly unlikely to be able to secure comparable services and charges (Company Initial Brief at 8, n.2, citing Exh. DTE 1-8; RR-DTE-2). The Company cites (1) NEGM's unique qualification in developing effective gas supply consortia for regulated

gas utilities since 1979; (2) NEGM's ability to help gas utilities to achieve efficiencies in project development, contract flexibility and operational economies, and savings in transactional and legal costs; (3) NEGM's Canadian gas contracting expertise; (4) NEGM's reasonable rates and charges; and (5) the Working Group's long standing relationship with NEGM for over 20 years, as the primary reasons the Working Group determined that an additional competitive solicitation would not have been productive (Exh. DTE 1-8; RR-DTE-2). Accordingly, the Company requests that the Department find the renewal process with NEGM to be appropriate (Company Initial Brief at 8, n.2).

Although the Company does not believe that the tariff change is necessary to address DOER's concern regarding how the Company communicates with marketers, it would not object to making the suggested tariff change (Company Initial Brief at 9-10, citing, Exh. DOER 1-11). The Company, however, suggests that any such change should be mandated for all LDCs (id.).

IV. STANDARD OF REVIEW

In evaluating a gas utility's resource options for the acquisition of commodity resources as well as for the acquisition of capacity under Section 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource that provides commodity and/or incremental resources is consistent with the public interest, an LDC must show that the acquisition (1) is consistent with the company's portfolio objectives, and (2) compares favorably to the range of alternative options reasonably available to the company and its customers, including releasing capacity to

customers migrating to transportation, at the time of the acquisition or contract negotiation. Id.

In establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved resource plan or in a recent review of supply contracts under G.L. c. 164, § 94A, or may describe its objectives in the filing accompanying the proposed resource. Id. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. Id. at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage, and commodity options that were available to the LDC at the time of the acquisition, as well as those opportunities that were available to other LDCs in the region. Id. In addition, the Department determines whether the acquisition satisfies the LDC's non-price objectives, including, but not limited to, flexibility of nominations and reliability and diversity of supplies. Id. at 29.

V. ANALYSIS AND FINDINGS

A. The Request For Proposal Process

The bid solicitation and evaluation process followed by Berkshire and the Working Group in this proceeding was similar to the process approved in recent proceedings. See The Berkshire Gas Company, D.T.E. 02-19, at 11 (2002) ("D.T.E. 02-19 (2002)"); The Berkshire Gas Company, D.T.E. 01-41, at 14 (2001); The Berkshire Gas Company, D.T.E. 99-81, at 3-5 (1999); Boston Gas Company, D.T.E. 99-76, at 20-22 (1999). In determining whether the RFP process was fair, open, and transparent, the Department finds that potential bidders were

notified on the specifics of how each bid would be evaluated. Specifically, the evaluation process was clearly stated to each potential bidder, evaluation criteria were provided, and there was an opportunity for bidders to request clarification from the Working Group on both the evaluation criteria and the RFP process itself. In addition, the bids were evaluated and the winning bid was selected based on the criteria set forth in the RFP. Thus, the Department finds that the RFP process was transparent.

The Company received no objections from potential bidders to indicate that a bidder was unfairly excluded from initial consideration or that a bid was unfairly evaluated. Accordingly, the Department finds that the RFP process as entered into by Berkshire and the Working Group was fair and open. Having found that the RFP process was conducted in a fair, open, and transparent manner, the Department approves the RFP process as appropriately conducted. Finally, our review of the responses to the RFPs indicates that the Company's proposal compares favorably to current market offerings considering price and non-price factors, as well as current market conditions facing the Company at the time of the execution of the Agreement.

B. Sales Agreement

The Department's review of Berkshire's proposal indicates that the Sales Agreement is consistent with the Company's resource portfolio objectives established in the Company's most recent Forecast and Supply Plan in The Berkshire Gas Company, D.T.E. 98-99 (1999) ('D.T.E. 98-99 (1999)'). Under the proposed Sales Agreement, EnCana will provide Berkshire with 1,083 Dth per day, on a firm basis, to replace a Boundary resource which expires on January 15, 2003. The replacement resource will enable the Company to continue

to provide reliable service to its customers.

The Department finds that the competitive solicitation process which led to the selection of EnCana as the winning bid ensured that Berkshire obtained a least-cost resource consistent with its portfolio objectives. The EnCana resource compares favorably to the range of alternatives reasonably available to the Company and its customers at the time of the agreement and enhances the diversity of the Company's resource portfolio. Furthermore, we find that Berkshire's participation in the Working Group ensured that the Company enjoyed substantial economies of scale in securing a least-cost replacement resource.

The Department finds that the Sales Agreement is consistent with the Company's resource portfolio objectives and compares favorably to the range of alternatives reasonably available to the Company and its customers at the time of the agreement. Accordingly, the Department finds that the Sales Agreement is consistent with the public interest, and we approve the Company's proposal.

C. Agency and Management Services Agreements

We conclude that the services to be performed under the Agency and Management Services Agreements are necessary and consistent with Berkshire's portfolio objectives established in the Company's Forecast and Supply Plan in D.T.E. 98-99 (1999). We also note that the services that NEGM will perform under these Agreements are distinct from the services that BP Energy currently provides under Berkshire's Gas Portfolio Optimization and Gas Sales Purchase Agreements in D.T.E. 02-19 (2002) (See Exh. D.T.E. 1-1). Therefore, there is no duplication of functions between NEGM and BP Energy.

NEGM has had a long working relationship with the Boundary Renewal Working

Group dating back to over 20 years, and NEGM has substantial Canadian gas contracting expertise. Furthermore, the services that NEGM will provide under these Agreements are a continuation of the services that NEGM currently provides to the Company under the Boundary agreement. NEGM has offered to continue to provide these services at the same rate that it now charges under the Boundary contract. For these reasons, the Department approves the Agency and Management Services Agreements in this proceeding.

The Department, however, notes that the Working Group did not solicit proposals before entering into the Agency and Management Services Agreements with NEGM. Therefore, before renewing these Agreements with NEGM when the Sales Agreement expires, we direct Berkshire to conduct a separate solicitation to test the market to see what other offerings it could get. Alternatively, Berkshire could provide evidence to show that there is no other entity that is capable of providing the type of services that NEGM offers.

D. DOER's Concerns

Regarding DOER's suggestion to amend the Company's Terms and Conditions to mandate annual meetings with marketers, the Department finds that such a change is beyond the scope of this proceeding, and therefore rejects it. In DTE Investigation into Gas Unbundling, D.T.E. 98-32-B (1999), the Department requested the Massachusetts Gas Unbundling Collaborative ("Collaborative") to develop a mechanism to include affected parties in LDC capacity management decisions. The Collaborative is the appropriate forum to address whether a revision to the Terms and Conditions is appropriate for all LDCs. Further, the Department finds that opportunities currently exist for marketers and other affected parties to participate in capacity management decisions. In particular, marketers have the opportunity to intervene in

the Forecast and Resource Plans submitted by the LDCs pursuant to G.L. c. 164, § 69I, as well as capacity and commodity acquisition proceedings submitted pursuant to G.L. c. 164, § 94A.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is hereby

ORDERED: That the gas sales agreement with EnCana Corporation and an agency agreement and management services agreement with Northeast Gas Markets LLC are APPROVED. These contracts are: (1) a gas sales agreement between The Berkshire Gas Company and EnCana Corporation; (2) an agency agreement between The Berkshire Gas Company and Northeast Gas Markets LLC; and (3) a management services agreement between The Berkshire Gas Company and Northeast Gas Markets LLC.

By Order of the Department,

Paul B. Vasington, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5 Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).